FILE COPY

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 88

THOMAS D. CLANCY and DONALD KASTNER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONERS.

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TABLE OF AUTHORITIES.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 932.

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UNITED STATES OF AMERICA.

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REPLY BRIEF FOR PETITIONERS.

I. The Government has chosen to completely ignore the important question of whether the private books and records used to conduct a wagering business constituted the **means and instrumentalities** for the commission of the crime of attempting to evade the payment of the 10% wagering tax.

They beg the question when they argue that because the Petitioners books and records were used by them in conducting the wagering business that they are "paraphernalia of bookmaking" and infer that this satisfies the requirements of Rule 41 (b) (2) of the Federal Rules of Criminal Procedure, "as the **means** of committing a criminal offense." Petitioners have already pointed out that in this connotation the items seized must be the means of committing a criminal offense against the Federal Government, and it does not suffice if the items are merely instrumentalities for the commission of a crime against an individual state. In this regard, Petitioners have already pointed out in their Petition that they had registered as bookmakers, had obtained a wagering stamp, had paid the $50.00 registration tax, and had reported and paid a tax on 10% of all wagers reported by them. It was no federal crime for the Petitioners to **engage** in the wagering business. The records were not falsely kept, and, in fact, the Government introduced them to show the correct amount of tax due. Therefore, the private books and records were not the **instrumentalities** for the commission of a crime against the United States, but were merely evidence of the amount of wagers received by them from all sources.

In support of this obviously erroneous conception, the Government cites as support for their position the Merritt[1] case which authorizes the seizure of gambling equipment where the defendants had failed to register and thereby had violated a federal law **by engaging** in the wagering business without registering and paying the applicable wagering taxes. That case is totally different from the facts in this case because the violation of the federal law in the Merritt case occurred **by engaging in the business** and not as a result of the manner in which the amount

[1] Merritt v. U. S., 240 F. 2d [illegible] (6th Cir.)

of the 10% wagering tax was **reported.** The other cases cited by the Government are likewise cases where the mere **engaging in the business** constituted the violation of a federal law.

They seek to justify the seizure of books and records of Petitioners' business which was registered and lawful under federal law on the grounds that, a) Agent Kienzler (who seized the records) didn't determine that the Petitioners' partnership had a tax stamp—although the contrary is shown in footnote 4 of the Opposition Brief, i. e., that Petitioner Kastner was present at the time of the raid and informed Kienzler that the partnership had a wagering stamp; and, b) because the words "at large"[1a] had been pencilled through the application for registration although there is no showing that this alteration had been made at the time of the raid, and it was affirmatively shown by Petitioners' accountant who testified that this was not done at the time he filed the application (Appellant's App. 140). Since the application was in the possession of some one or other Government agency since the time it was filed, it is only fair to assume that this alteration was made by some Government agent at sometime before trial, but there was no showing by the Government that the alteration had been made at the time the records were seized. The Government seems to argue that if a valid search warrant is issued that anything described in the warrant may be seized whether private papers or not which is, of course, contrary to the holding of this Court in the recent case of **Abel v. U. S., 80 S. Ct. 683, 695.**

The most absurd and misleading argument of the Government is that the books and records maintained by the Petitioners in conducting the wagering business were not

[1a] This same alteration was made in the case of U. S. v. Sliker et al. (R. 125) cited in appendix to government's brief, which case was reversed by the Seventh Circuit.

"private books and records" **since they were required to be kept by law**, and by innuendo that they are therefore not protected by the Fourth and Fifth Amendments to the Constitution of the United States. In support of this proposition they cite three cases: (Shapiro,[2] involving the exercise of wartime powers of the United States to regulate price controls in the public interest; Davis,[3] involving a seizure of Government owned gasoline coupons; and, Wilson,[4] involving the compulsory production of corporate records) and on the basis of these decisions they request this Court to refuse to issue a Writ of Certiorari to review a decision of the lower court which holds that all records required to be kept by Title 26, Sec. 6001, Internal Revenue Code are public records and are therefore subject to compulsory production to be used as evidence in a criminal proceeding.[5]

If this Court would follow the suggestions of the Government, it would, by its refusal to act, determine the constitutional rights under the Fourth and Fifth Amendments of every person required to keep records by the Internal Revenue Code and would destroy the constitutional right of every taxpayer, i. e., to be secure from unreasonable search and seizure and not to be compelled to be a witness against himself in a criminal proceeding.

II. The government concedes in its brief in opposition that the reports and summaries of the government agents who testified in this case were statements which should have been produced. The Court of Appeals of the Seventh Circuit less than three weeks after it denied a peti-

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[2] *Shapiro v. United States*, 335 U. S. 1.

[3] *Davis v. United States*, 328 U. S. 582.

[4] *Wilson v. United States*, 221 U. S. 361.

[5] Petition, Appendix B, p. 41.

tion for rehearing in this case completely reversed itself and held that government agents' reports were producible. **U. S. v. Berry** (O. B., p. 14).

The same court within a span of six weeks makes these completely divergent pronouncements on the same issue. In **U. S. v. Clancy** (App. Pet., pp. 47-48), it states:

"The next contested issue is whether the trial court erred in refusing to order the Government to produce the memoranda or reports of the government agents pursuant to the 'Jencks' Act. 18 U. S. C. Sec. 3500. . . ."

> "We think there is a distinction between the type of case here at hand and those cases in which the Government produce as a witness an undercover agent whose dealings with the accused are the subject of the agent's testimony at the trial. Here the defendants were aware of the identity of the government agents at the time they made the statements which later furnished the basis of the prosecution against them. They were not dealing with undercover agents whose true identity they did not know."

In U. S. v. Sheer et al. (O. B., p. 27), it holds:

> "We have held that this Act applies to government agents who testify for the prosecution in federal criminal cases. U. S. v. Berry, F. 2d, No. 12822, May 2, 1960.
>
> "We find that the term 'statement' as used in the Act applies to the reports made by the agents in this case. A report is defined as 'a statement in writing of proceedings and facts exhibited by an officer to his superiors'. Webster's Dictionary."

This court's concern for the uniform administration of justice to all litigants demands that this Petition for Certiorari be allowed.

Despite the fact that the Seventh Circuit has recognized the error of its ruling in the instant case in two subsequent decisions[6] as to the applicability of Title 18, U. S. C., Sec. 3500, the conflict still remains in the Circuits[7] and is now compounded by a conflict in the Seventh Circuit itself.[8]

This is a case which screams for justice and only this court can grant it.

The Government recognizes the error in this case but attempts to wrap the tattered garment of "harmless error" about it. This case cannot be equated with **Rosenberg v. U. S.**, 360 U. S. 371. In the Rosenberg case, the defendant demanded a copy of a statement, the original of which was already in his possession, and further demanded a statement which would only have confirmed the damaging admissions made by the witness on the stand, and in no way could have been designated as an impeachment document.

The petitioners accepted the notes of those agents who made note because they could not get the statements. The notes of an agent are no more his complete and finished statement than the "chicken scratches" on the napkin of

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[6] *U. S. v. Berry*, No. 12,822 (Gov't. App. p. 14); *U. S. v. Sheer et al.*, Nos. 12,826-12,828 (Gov't. App. p. 22).

[7] *U. S. v. Clancy et al.*, 276 F. 2d 617 (7th Cir.); *Johnson v. U. S.*, 269 F. 2d 72 (10th Cir.); *Borges v. U. S.*, 270 F. 2d 332 (D. C. Cir.); *Tillman v. U. S.*, 268 F. 2d 422 (5th Cir.), which hold that the defendant is not entitled to the memoranda of government agents, and on the other hand *U. S. v. O'Connor*, 273 F. 2d 358 (2nd Cir.); *U. S. v. Holmes*, 271 F. 2d 635 (4th Cir.); *U. S. v. Prince*, 264 F. 2d 850 (3rd Cir.), and *U. S. v. Berry*, No. 12,822 (Gov't. App. p. 14), and *U. S. v. Sheer et al.*, No. 12,826 (Gov't. App. p. 22), which hold that the defendant is entitled to the memoranda and reports of government agents after they have testified pursuant to Title 18, U. S. C., Sec. 3500.

[8] *U. S. v. Clancy et al.*, supra, and *U. S. v. Sheer et al.*, supra.

an after dinner speaker is the speech of that speaker. When the demand is for memoranda, reports and summaries, the production of notes is no compliance with the statute.

The government in claiming that the production issue relates only to the false statement counts, and not the tax evasion and conspiracy counts, forgets about United States v. Beacon Brass Co., 344 U. S. 43, which holds that false oral statements to treasury agents may constitute the crime of tax evasion. Moreover, the interview with Kastner on May 6, 1957, discussed, inter alia, the partnership, the members thereof, the records and who kept them, the extent of Kastner's activities as a partner, if any, all of the matters which the government alleged and introduced as evidence to sustain the charge of wilfully attempting to evade in Count IV and conspiring to evade the wagering tax in Count V.

While the testimony given in the interviews on December 13 and 14, 1956, was the basis of the false statement charge, the alleged false statements of the petitioners as to their having no other employees or agents permeates Counts IV and V and every subparagraph thereof.[9] The Petitioners' defense in this case was that the statements were not false and that all the agents and employees referred to were in fact independent contractors operating an independent business; that the bets taken by these individuals and placed with these petitioners were layoff bets;

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[9] For example, Count IV, subparagraph 3, accuses the defendants of concealing lists of agents; Subparagraph 4 accuses the defendants of concealing and covering up the scope and extent of the wagering business; Subparagraphs 5, 6 and 7 allege the false statements and these are alleged as proof of the attempt to defeat and evade a large portion of the Federal Excise Tax. Count V is identical. It inferentially and specifically refers to the false statements, and then in Subparagraph 4 of Count V incorporates the allegations of Counts I through IV, inclusive, as additional overt acts in Count V.

and, the petitioners, accepting the law at its face value believed the original acceptors of the layoff bets were liable for the tax and that, therefore, the petitioners, themselves, were not guilty of the requisite wilfullness and intent to evade. Even the court's instructions has as part of their evidentiary basis the substance of the interviews which the government now wants to restrict to Counts I-III.[10]

The government pulls a heavy oar when it argues that this error was not prejudicial. The Seventh Circuit, itself, now rejects this argument. Schnackenberg, Circuit Judge, states in **U. S. v. Sheer et al.** (O. B., pp. 28-29):

> "Substantial error was committed in the nonproduction of the reports of Edwards and Yerly for use by defendants in their defense in the district court. It is not proper for this court to determine whether defendants were prejudiced by failure to make available to them the prior statements of Yerly and Edwards any more than it would be proper for the trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness' testimony in open court. Bergman v. United States, 253 F. 2d 933, 936. A reversal of the judgment is required. A remandment for a new trial will be ordered."

[10] For example, in the court's instructions found in Appellants' Appendix, p. 178: "There are certain circumstances which you may consider as pointing to whether or not the defendants had the intent to and did attempt to evade or defeat the payment of the excise tax on wagers. . . . *covering up sources of wagers, . . . any conduct the likelihood of which would be to mislead or conceal.* I give you these instances simply to illustrate the type of conduct from which you may infer intent to evade taxes." In Appellants' Appendix, p. 172, the court instructed on layoff bets which inadequately presented the petitioners' position that the statements were not false, but that the so-called agents and employees were, in fact, independent bookmakers laying off to the defendants.

CONCLUSION.

It is respectfully submitted that the brief for the United States in opposition only reaffirms the conclusion that in order to assure these defendants their rights under the Fourth and Fifth Amendments, and in order to prevent a gross miscarriage of justice, the petition for certiorari should be granted.

Respectfully submitted,

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